render the deed any less than an assignment which is what the parties intended. Consent operates no more than a legal recognition by the appellant company of the validity of the transfer of rights from the assignor (Yeo Tiang Chin) to the respondents and that consent binds them.

Referring to the second objection, there seems to be a confused thinking here. What was transferred from the assignor to the respondents in so far as the matter in issue is concerned, was not liability but a right to have vacant possession of the house delivered within eighteen months from the date of the sale and purchase agreement. The appellant company's liability to deliver vacant possession within that period remained with the appellant company and was not transferred to any one else, though in the discharge of this obligation it has to deliver it to the respondents instead of to the assignor (the original purchaser). This is what the assignment is all about. Moreover, for the deed to amount to a novation, the appellant company must show that there was consideration moving between them and the respondents. Here they fail to do so.

Novation is a new contract. It extinguishes rights and obligations under the old contract for which the new contract is made. Being a new contract, there must be consent by all parties and there must be consideration, and rights and obligations under it are not those transferred from the old contract which is already extinguished. (See *Chitty* on Contract, Vol. 1, 1983 edition at paragraphs 1315 and 1316).

Looking at the deed we fail to find anything which suggests extinguishment of rights and obligations under the sale and purchase agreement. There is nothing either to show any consideration moving between the appellant company and the respondents, which is a vital requirement for a novation.

We therefore hold that the deed of assignment dated November 29, 1978 was an assignment. This appeal is dismissed with costs. We order that the appeal deposit be paid to the respondents towards taxed costs.

Appeal dismissed.

Solicitors: *A.K. Lee & Co.; Y.K. Ng & Co.*

TAN LIN SIEW & ANOR. v. SYED HUSSEIN BIN ALWI

[S.C. (Wan Suleiman, Syed Agil Barakbah & Wan Hamzah S.C. JJ.) July 9 & September 9, 1986]

[Kota Bharu – Supreme Court Civil Appeal No. 69 of 1984]

Torts – Negligence – Road accident – Quantum of damages – Pre-trial loss of earnings not pleaded – Future loss of earnings – Damages for pain and suffering – General and special damages – Pleading.

Damages – Leg – Shortening 1" – 30% disability – Pain and suffering – Loss of earning.

In this case the respondent who was riding a bicycle was knocked down by the first appellant who was driving a motor car in the opposite direction. As a result he suffered a trochanteric fracture to his left femur which resulted in a 1" shortening of his left leg. The learned trial judge recorded the injuries as follows:

"(a) 30% permanent disability,

(b) 1" shortening of left leg;

(c) Unfit for jobs that require continuous use of both lower limbs"

The learned trial judge also found as follows :

"After the accident his wife and one of the sons help him to tap the rubber trees. The plaintiff is now 43 years old. He met the accident on December 2, 1978 when he was about 39 years old.

Up to the date of accident (December 2, 1978) plaintiff alone was tapping the rubber trees on the land allotted to him, right from the day he became a settler. His net income before the accident was :

i) in 1977 – $3,408.53

ii) in 1978 – $3,316.71

His net income after the accident with his wife and son working are :

i) 1979 – $2,818.00

ii) 1980 – $4,556.00

iii) 1981 – $4,594.00 (skipping the cents)

For 1 year after the accident (*i.e.* from December 1978 to December 1979) he could not work at all. Now, he can only assist his wife and son.

Plaintiff has to give money to his son as a wage otherwise he would not work. He gives 1/3 of the income to his son. And if his son does not want to work he has to engage someone to do the work. His earning will be ¼ of joint earning with the wife after deducting 1/3 to his son."

The learned trial Judge had to decide only on the question of quantum, 100% liability having been conceded by the appellants. His award was as follows :

"1. The defendants to pay the plaintiff:
Special damage of $1,660.00 (as agreed) with 3% interest per annum from date of filing of writ to date of realisation of Judgment.

2. Loss of earning pre-trial amount to $14,795.00 with 6% interest per annum from date of accident to date of realisation of Judgment.

3. Loss of future earning capacity $21,705.60

4. Pain and suffering $15,000.00 with 6% interest from date of accident to date of realisation of Judgment."

The appellants appealed against quantum.

Held: (1) as the pre-trial loss of earnings had not been pleaded as an additional item of special damages, the sum was wrongly allowed;

(2) on the facts the respondent's average income before the accident should be calculated at $3,400 per annum. The average income after the accident (including son's and wife's efforts) should be $4,000. After deduction of 1/3 wages paid to the son, that is $1,330 per annum the balance of the joint income of the husband and wife is $2,670. From the plaintiff's income before the accident, that is $3,400 per annum should be deducted the sum of $2,670 leaving $730 per annum as the net loss of future earning. At 8 years' purchase according to the annuity table the sum awarded would be $4,700, rounded off to $5,000,

(3) the appeal against quantum will be allowed and the following figures awarded :

1. Special damages of $1,660 as agreed with 3% interest per annum from date of accident to date of judgment;

2. Loss of future earning – $5,000;

3. Pain and suffering – $15,000 with 6% interest per annum from date of service of writ to date of judgment;

4. Interest at 8% per annum on items (1), (2) & (3) from date of judgment to date of realisation.

5. Costs here and below.

Cases referred to:

(1) *Lim Whong In* v. *Hock Cheong Newspaper Transport Co. Ltd. & Ors.* [1967] 1 M.L.J. 105.
(2) *Ilkiw* v. *Samuels & Ors.* [1963] 2 All E.R. 879, 891.
(3) *Yee Hup Transport Co. & Anor.* v. *Wong Kong* [1967] 2 M.L.J. 93.
(4) *Moeliker* v. *A. Reyrolle & Co. Ltd.* [1977] 1 All E.R. 9.
(5) *Lim Eng Kay* v. *Jaafar bin Mohamed Said* [1982] 2 M.L.J. 156.

SUPREME COURT.

Datuk H.L. Wrigglesworth for the appellants.
Wan Abdul Muttalib for the respondents.

Cur. Adv. Vult.

Wan Suleiman S.C.J. (delivering the Judgment of the Court): The respondent became a settler in one of the Felda Land Settlement Schemes – the Felda Belara – on February 24, 1974 and was allotted 8.47 acres of rubber, the trees being already tappable. The land is a bit hilly, a relevant factor in view of his subsequent disability.

He had a wife and 9 children, and before the accident it was undisputed that he alone did all the rubber tapping.

On December 2, 1978 whilst he was riding his bicycle he was knocked down by the first appellant who was driving a motor car in the opposite direction. As a result he suffered a trochanteric fracture to his left femur which resulted in a 1" shortening of his left leg. The learned trial judge recorded his present disabilities as follows:

"(a) 30% permanent disability,
(b) 1" shortening of left leg;
(c) Unfit for jobs that require continuous use of both lower limbs."

The learned trial judge also found as follows:

"After the accident his wife and one of the sons help him to tap the rubber trees. The plaintiff is now 43 years old. He met the accident on December 2, 1978 when he was about 39 years old.

Up to the date of accident December 2,1978 plaintiff alone was tapping the rubber trees on the land allotted to him, right from the day he became a settler. His net income before the accident was:

i) in 1977 – $3,408.53
ii) in 1978 – $3,316.71.

His net income after the accident with his wife and son working are:

i) 1979 – $2,818.00
ii) 1980 – $4,556.00
iii) 1981 – $4,594.00 (skipping the cents).

For 1 year after the accident (*i.e.* from December 1978 to December 1979) he could not work at all. Now, he can only assist his wife and son.

Plaintiff has to give money to his son as a wage

otherwise he would not work. He gives 1/3 of the income to his son. And if his son does not want to work he has to engage someone to do the work. His earning will be 1/4 of joint earning with the wife after deducting 1/3 to his son."

The learned trial Judge had to decide only on the question of quantum, 100% liability having been conceded by the appellants. His award is as follows:

"1. The defendants to pay the plaintiff:
Special damage of $1,660.00 (as agreed) with 3% interest per annum from date of filing of writ to date of realisation of Judgment.
2. Loss of earning pre-trial amount to $14,795.00 with 6% interest per annum from date of accident to date of realisation of Judgment.

3. Loss of future earning capacity $21,705.60

4. Pain and suffering $15,000.00 with 6% interest from date of accident to date of realisation of Judgment."

This appeal is thus against quantum only.

Though the learned Judge noted that loss of earnings (meaning pre-trial loss) was never pleaded, respondent apparently applied at the trial to include a claim under this heading. This application was alluded to in the Grounds of Judgment. There is no reference of such application having been made anywhere in the notes taken by the trial Judge, though it was noted that counsel for the appellants had indicated to the court that the Statement of claim did not include claim for loss of future earnings, an omission which formed the basis of another ground of appeal.

In any event the trial Judge said in his judgment that the court has the discretion and did allow this application for (pre-trial) loss of earnings. citing the Federal Court decision in *Lim Whong In* v. *Hock Cheong Newspaper Transport Co. Ltd. & Ors.*[1] as authority for the proposition that it is part of general damages. There the appellant/plaintiff had appealed against the quantum of general damages awarded to him as a result of an accident in which he sustained injury to his arm. He was awarded $15,000 as general damages only. One of the grounds of appeal raised was that the learned trial Judge had given damages for injuries only and had failed to take account of any loss of future earnings when, in his judgment he said: "In my view $15,000/- should be ample damages for the injuries on the left arm." The Federal Court held that although the learned Judge has not expressed himself fully the expression in "damages for injuries" includes damages for loss of future earnings.

However, whilst loss of future earnings is certainly part of general damages and therefore need not be particularised in pleadings – see *Halsbury's* Law of England 4th Edition Vol. 12, page 482 paragraph 1197 – Pleading Damage, Dato' Wrigglesworth's complaint is that pre-trial loss, which is special damages, was never pleaded.

Learned counsel cited a passage from *Ilkiw* v. *Samuels & Ors.*[2] at 891 where Diplock L.J. (as he then was) said:

"As regards the question of damages, I would put it in this way. Special damage in the sense of monetary loss which the plaintiff has sustained up to the date of trial must be pleaded and particularised. In this case special damages were so pleaded and particularised at the sum of £77 odd. Shortly before the trial, the special damage (as so particularised) was agreed at £77 by letter. In my view, it is plain law – so plain that there appears to be no direct authority, because everyone has accepted it as being the law for the last hundred years – that one can recover in an action only special damage which has been pleaded, and, of course proved. In the present case, evidence was called at the trial the effect of which was that the plaintiff had sustained special damage of a very much larger sum, amounting, I think it would work out at, to something like £2,000 – at any rate, a very much larger sum than £77. This was not pleaded, and no application to amend the statement of claim to plead it could be made because of the agreement already arrived at at the sum of £77 for special damage. The evidence about the loss of earnings in excess of £77 was admissible, not as proof of special damage (which had not been pleaded) but as a guide to what the future loss of earnings of the plaintiff might be."

It would follow that not having pleaded this additional item of special damages, this sum was wrongly allowed and the appeal should be allowed to that extent.

We should remember that the object of pleading is to give the other side notice so that it can prepare for the trial and if necessary make a payment into court. What the learned trial Judge should have done was to allow an amendment to the statement of claim and if it need be subsequent amendment to the statement of defence before proceeding to admit evidence and to assess the amount under the particular item complained about.

The next item of damages complained of was the award under the heading "loss of future earning capacity" for which a sum of $21,705.60 was awarded (see page 25 of Record). We agree that the learned trial Judge seemed to have confused the term "loss of earning capacity" with "loss of future earnings".

We take it that having dealt with pre-trial loss earlier the learned trial Judge had future loss of earnings in mind. Indeed that is the only heading under which he could properly have awarded damages.

Dato' Wrigglesworth contends that loss of future earnings should also be pleaded citing as his authority *Yee Hup Transport & Co. & Anor.* v. *Wong Kong*[3] which in turn cited *Ilkiw* v. *Samuels & Ors* (*supra*). However, with deepest respect, we note that *Ilkiw's case* covers special damages and not general damages under which loss of future earnings would fall.

Alternatively Dato' Wrigglesworth contends that the award under the second heading, which obviously is, in our view, for loss of future earnings, is manifestly excessive. He submits that it should not be $3,320 per annum but should be nothing the average income after the accident being nil.

Let us look at the evidence. From the time of his accident *i.e.* from December 1978 until January 1981, the respondent/plaintiff could not work at all. From February 1981 he could only manage to perform about 30% of work which was to tap rubber. His wife and children took over his work during his period of total incapacity. The learned trial Judge's computation at pages 24/25 based on the figures given on pages 45 to 47 appears to be a fair and accurate computation of personal *loss of earning capacity* because that amount is what his son and wife in effect earned from their labours. However, is this an accurate computation of actual loss of earning capacity?

Dato' Wrigglesworth cites the authority of *Moeliker* v. *A. Reyrolle and Co. Ltd.*[4] the headnote of which sufficiently sets out the principle involved –

"In awarding damages for personal injury in a case where the plaintiff is still in employment at the date of the trial, the court should only make an award for loss of earning capacity if there is a substantial or real, and not merely fanciful, risk that the plaintiff will lose his present employment at some time before the estimated end of his working life. If there is such a risk, the court must, in considering the appropriate award, assess and quantify the present value of the risk of the financial damage the plaintiff will suffer if the risk materialises, having regard to the degree of the risk, the time when it may materialise, and the factors, both favourable and unfavourable, which, in a particular case, will or may affect the plaintiff's chances of getting a job at all or an equally well paid job if the risk should materialise. No mathematical calculation is possible in assessing and quantifying the risk in damages. If, however, the risk of the plaintiff losing his existing job, or of his being unable to obtain another job or an equally good job, or both, are only slight, a low award, measured in hundreds of pounds, will be appropriate."

We should note in this case that the respondent is in a way self-employed. At pages 11 to 14 of the Appeal Records we will find the testimony of the Manager of Felda Belara, Hashim bin Mohamad. His evidence is that settlers are paid twice a week for the crops they bring in. He confirms the respondent's evidence that his wife and son had taken over his work after the accident. The first question is, are we to consider his prospective loss of earning in the future, earnings resulting from his own physical efforts? Or are we merely to consider his loss of earning as a family unit arising from the fact that he owns productive rubber land, after, perhaps deducting any wages he is obliged to pay to his son?

As was said in *McGregor* on Damages 14th Edition paragraph 1170, where the plaintiff is self-employed, the calculation, though it would follow similar lines as that of a wage earner, would be rather more complex.

The learned trial Judge set out his working in some detail from pages 23 to 25 of the Records. Briefly his method is the same for both pre-trial loss and post-trial loss.

We quote (from pages 24/25):

". . . . This means from the date of accident to trial his loss of earning equals to what he gave to his son and 3/4 of the balance (which is his wife's earning) – $3,325.00 per year for the year 1980 up to date of trial. Therefore loss of income for 1 year (1978 to 1979) when Plaintiff could not work at all is $3,389.00. For 1980, 1981 and 3 months of 1983 – $10,806.00. Total loss of income, pre-trial $14,795.00."

Loss of future earning was also taken to be $3,325 per year.

We do not agree with these figures.

Respondent's average annual income prior to

the accident we would calculate at $3,400 per annum.

Average annual income after accident (including son's and wife's efforts) – $4,000/-.

1/3 wages paid to son – $1,330 per annum.

Balance joint income by respondent and wife $4,000 - 1,330 = $2,670.

We agree that the son's income should be deducted from the total earning because he was already earning as a labourer and if he was not paid he would not do the work. The wife's income however should not be deducted because it is a joint income. According to the Manager's evidence so long as the monthly payments back to Felda are made it would not matter if the tapping was done by the wife and children of the settler rather than the settler himself. The way of life of settlers in such land schemes should be considered and apart from the deduction we have allowed for the son who otherwise would be working elsewhere it is the joint income of this self-employed respondent we should have in mind, rather than his individual capacity to tap rubber.

From the plaintiff's income before the accident *i.e.* $3,400 per annum should be deducted the sum of $2,670 leaving $730 per annum as the net loss of future earning which we would accept.

We accept the Judge's award of 8 years purchase according to the annuity tables so that the sum we would award under this heading would be $61 (monthly) times 8 years *i.e.* approximately $4,700/- (according to Annuity Table) and to round it off, we would make it $5,000/-.

The other item for pain and suffering, *i.e.* $15,000, we will leave unaltered.

There is only one other comment we wish to make and that is the reference by Wan Muttalib to the case of *Lim Eng Kay* v. *Jaafar bin Mohamed Said*[5] on which he relied for the proposition that general damages need not be pleaded. That case should be distinguished, for there pre-trial loss was pleaded but under the heading of general damages.

To recapitulate, we allow this appeal against quantum and would award the following figures:-

1. Special damages of $1.660/- as agreed with 3% interest per annum from date of accident to date of judgment;
2. Loss of future earning – $5,000/-;
3. Pain and suffering – $15,000/- with 6% interest per annum from date of service of writ to date of judgment;
4. Interest at 8% per annum on items (1), (2) & (3) from date of judgment to date of realisation;
5. Costs here and below.

Deposit to be refunded.

Appeal allowed.

Solicitors: *Wrigglesworth & Co.: Wan Abd. Muttalib & Co.*

NEW KOK ANN REALTY SDN. BHD. v. DEVELOPMENT & COMMERCIAL BANK LTD., NEW HEBRIDES (IN LIQUIDATION)

[S.C. (Lee Hun Hoe C.J. (Borneo), Wan Suleiman & Seah S.C. JJ.) June 16 & November 15, 1986]

[Kuala Lumpur – Supreme Court Civil Appeal No. 430 of 1985]

Contract – Claim in respect of two bank drafts – Loan – Act done for another person – Contracts Act, 1950, s. 71.

In this case the respondents brought an action to claim from the appellants repayment of loans of US$25,000.00 and US$100,000.00. It was alleged that the sums were paid to the appellants by bank drafts. The appellants denied requesting the respondent for the sums by way of loan or that they had agreed or promised to repay them. They further said that if the said sums were remitted by the respondents to the appellants they were not for the benefit of the appellants but for the use or benefit of Mosbert Finance (Hongkong) Ltd. or other persons or companies. The learned judge gave judgment in favour of the respondents under the heading of loans and section 71 of the Contracts Act, 1950. The appellants appealed.

Held, dismissing the appeal: the learned trial judge had rightly given judgment under the headings of loan and section 71 of the Contracts Act, 1950. He had considered that all the four conditions in section 71 of the Contracts Act, 1950, had been satisfied and the respondents had therefore established their claim under the said section.

Cases referred to:

(1) *Siow Wong Fatt* v. *Susur Rotan Mining Ltd. & Anor.* [1967] 2 M.L.J. 118.

(2) *Royal Bank of Canada* v. *Rex.* [1913] A.C. 283, 296.